Trevor Kenneth Maringking (the administrator of the estate of the late Yunof @ Edward Meringking, deceased) v Pantai Dalit Beach Resort Sdn Bhd

HIGH COURT (KOTA KINABALU) — SUIT NO BKI-22NCvC-93/9 OF 2016
CELESTINA STUEL GALID JC
5 NOVEMBER 2018

Damages — Special Damages — Aggravated damages — When it should be allowed

Tort — Damages — Claim for — Whether defendant liable for special damages — Whether defendant liable for general/exemplary and/or aggravated damages

Tort — Negligence — Adjoining properties — Defendant excavated plaintiff's lands without plaintiff's consent — Defendant left big boulders on parts of plaintiff's lands — Whether defendant acted in breach of its duty of care and/or committed negligence — Whether plaintiff estopped from taking action against defendant

Tort — Trespass to land — Adjoining lands — Defendant constructed concrete road which encroached into plaintiff's lands — Whether construction of road by defendant on plaintiff's lands constituted trespass — Whether plaintiff estopped from taking action against defendant

The plaintiff was the administrator of the estate of his father who was the registered owner of native lands ('the plaintiff's lands) while the defendant was the registered owner of a piece of land ('the defendant's land') and the defendant operated a hotel and golf course known as Shangri-La's Rasa Ria Resort and Spa ('the hotel') on the defendant's land. The suit pertained to a concrete road ('the said road) which the plaintiff alleged to have been constructed by the defendant without the consent of the deceased which encroached onto the plaintiff's lands. The issues to be tried were: (a) whether the defendant's construction of the said road on the said portion of the plaintiff's lands tantamount to a trespass; (b) whether the defendant was negligent and/or owed a duty of care to the plaintiff in the construction of the said road and if so, whether there was a breach of such duty of care; (c) whether the defendant was liable for special damages in the sum of RM8,340; (d) whether the defendant was liable for general/exemplary and/or aggravated

damages; and (e) whether the plaintiff was estopped from taking legal action herein against the defendant — with regards to this issue, the defendant solely relied on the letter dated 8 November 1994 ('the said letter') from the defendant to the deceased.

Held, allowing the claim in part:

(1) The plaintiff was not estopped from commencing the action as the defendant did not dispute the fact that the access road referred to in the said letter and as shown in its attachment differed from the said road which was eventually constructed. Therefore, it could not be said that the deceased had made the defendant believe or expect that it was entitled to construct the said road or any road for that matter some 20 years later in 2014 for estoppel to apply (see paras 15–16).

(2) The defendant's construction of the said road on the portion of the plaintiff's lands tantamount to a trespass. After the suit had commenced, upon the inquiry of the defendant with the Lands and Surverys Department regarding the said portion of the plaintiff's lands, the department issued an order for rectification of the title deed to the defendant's land on the ground of a mistake. This conclusively established that the plaintiff had never been displaced of that portion of the plaintiff's lands, therefore the construction of the said road onto the said portion of the plaintiff's lands amounted to a trespass. The mistake by the Lands and Surveys Department in issuing the title deed was not a valid defence to the defendant (see paras 28, 36 & 41).

(3) The defendant was negligent in the construction of the road. The plaintiff and defendant had a relationship of proximity as envisaged in *Donoghue v Stevenson* [1932] AC 562. There was no evidence that the issue of acquisition which was raised by the DBKK was attended to by the defendant before proceeding to construct the said road, the defendant never attempted to check whether the said portion of the plaintiff's lands was in fact acquired by the state government. Further, as a prudent surveyor, DW1 had the duty to ascertain whether there was acquisition of the affected lands. Given the fact that the defendant and the deceased had prior discussions about an access road which would affect the plaintiff's lands, it was inconceivable that the defendant would merely rely on the purported official documents when DW1 himself agreed that a notice of acquisition was required (see paras 44, 52 & 55).

(4) The claim for special damages was allowed as it was particularised in the statement of claim and in support, PW1 tendered evidence in the form of land search certificates and receipts, certified true copies of the plaintiff's title deeds and receipts for the extracts, payments receipts for the on-site preliminary investigation or survey report and the topographical and demarcation survey plan, tax invoice and payment receipt. Further, the

defendant did not bring any evidence to rebut the amount claimed under this head by the plaintiff (see paras 58–59). A

(5) The defendant did not do anything that was malicious or illegal and thus, was not liable for aggravated and/or exemplary damages. At the material time of the construction of the said road, the said portion of the plaintiff's lands were included in the defendant's title deed (see paras 63). B

[Bahasa Malaysia summary

Plaintif merupakan pentadbir harta pusaka bapanya yang merupakan pemilik berdaftar tanah adat ('tanah plaintif') manakala defendan merupakan pemilik berdaftar satu bidang tanah ('tanah defendan') dan defendan menguruskan satu hotel dan padang golf yang dikenali sebagai Shangri-La Rasa Ria Resort and Spa ('hotel tersebut') atas tanah defendan. Saman ini berkaitan dengan satu jalan konkrit ('jalan tersebut') yang mana plaintif mengatakan telah dibina oleh defendan tanpa izin si mati yang mencerobohi tanah plaintif. Isu-isu untuk dibicarakan adalah: (a) sama ada tindakan defendan membina jalan tersebut pada bahagian tanah plaintif terjumlah kepada satu pencerobohan; (b) sama ada defendan cuai dan/atau mempunyai kewajipan untuk berjaga-jaga kepada plaintif dalam membina jalan tersebut, dan sekiranya ya, sama ada wujud pelanggaran kewajipan tersebut; (c) sama ada defendan bertanggungan kepada ganti rugi khas berjumlah RM8,340; (d) sama ada defendan bertanggungan kepada kerugian am/contoh dan/atau teruk; dan (e) sama ada plaintif diestop daripada mengambil tindakan undang-undang di dalam ini terhadap defendan — berkaitan dengan isu, yang defendan bergantung kepada surat bertarikh 8 November 1994 ('surat tersebut') daripada defendan kepada si mati. C D E F

Diputuskan, membenarkan sebahagian daripada permohonan:

(1) Plaintif tidak diestop daripada memulakan tindakan tersebut kerana defendan tidak mencabar fakta yang mana jalan masuk yang dirujuk dalam surat tersebut seperti ditunjuk dalam lampiran berbeza dengan jalan kemudiannya dibina. Oleh itu, ianya tidak boleh dikatakan bahawa si mati telah membuat defendan percaya atau berharap bahawa dia berhak untuk membina jalan tersebut atau apa-apa jalan 20 tahun kemudian pada 2014 untuk estopel terpakai (lihat perenggan 15–16). G H

(2) Tindakan defendan membina jalan tersebut pada sebahagian daripada tanah plaintif terjumlah kepada satu pencerobohan. Selepas saman telah dimulakan, atas pertanyaan yang dibuat oleh defendan dengan Jabatan Tanah dan Survei berkaitan dengan sebahagian daripada tanah plaintif, jabatan telah mengeluarkan perintah pembetulan pada suratikatan hakmilik atas alasan kesilapan. Ini secara konklusif membuktikan bahawa plaintif tidak pernah disalah letak berkaitan dengan bahagian tanah plaintif yang berkaitan, oleh itu pembinaan jalan tersebut atas I

A sebahagian daripada tanah milik plaintif terjumlah kepada satu pencerobohan. Kesilapan Jabatan Tanah dan Survei dalam mengeluarkan suratikatan hakmilik tersebut bukanlah satu pembelaan yang sah untuk defendan (lihat perenggan 26, 36 & 41).

B (3) Defendan cuai dalam pembinaan jalan tersebut. Plaintif dan defendan mempunyai hubungan rapat sepertimana yang dinyatakan dalam *Donoghue v Stevenson* [1932] AC 562. Tiada keterangan berkaitan dengan isu pengambilan yang dibangkitkan oleh DBKK yang dikendalikan oleh defendan sebelum bertindak dengan meneruskan
C pembinaan jalan tersebut, defendan tidak pernah cuba untuk memeriksa sama ada bahagian tanah plaintif tersebut sememangnya diperoleh oleh kerajaan negeri. Lanjutan itu, sebagai seorang juruukur yang cermat, DW1 mempunyai tanggungjawab untuk memastikan sama ada wujud atau tidak pemerolehan tanah yang berkaitan. Mengambil kira fakta
D bahawa defendan dan si mati mempunyai perbincangan terdahulu berkaitan dengan jalan akses yang akan memberi kesan kepada tanah plaintif, ianya tidak boleh dibayangkan bahawa defendan akan bergantung semata-mata kepada apa yang kononnya merupakan dokumen rasmi apabila DW1 sendiri bersetuju satu notis pemerolehan
E diperlukan (lihat perenggan 44, 52 & 55).

(4) Tuntutan untuk ganti rugi khas dibenarkan kerana ianya dibutirkan dalam penyataan tuntutan dan sebagai sokongan, PW1 mengemukakan keterangan dalam bentuk sijil carian tanah dan resit, salinan diakui sah
F ikatan surat hakmilik plaintif dan resit untuk ekstrak, resit bayaran untuk siasatan awal di kawasan atau laporan survei dan pelan topographikal dan pembatasan, invois cukai dan resit bayaran. Lanjutan itu, defendan tidak mengemukakan apa-apa keterangan untuk mematahkan jumlah tuntutan ini oleh plaintif (lihat perenggan 58–59).

G (5) Defendan tidak melakukan apa-apa dengan niat jahat atau haram dan oleh itu, tidak bertanggungan kepada ganti rugi teruk dan/atau teladan. Pada masa yang material sewaktu pembinaan jalan tersebut, bahagian tanah plaintif termasuk dalam surat ikatan hakmilik defendan (lihat perenggan 63).]

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Notes

For a case on adjoining lands, see 12(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2410.

For cases on adjoining properties, see 12(1) *Mallal's Digest* (5th Ed, 2017
I Reissue) paras 1162–1184.

For cases on damages in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 221–381.

For cases on special damages in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 427–428.

Cases referred to

Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497; [2001] 4 CLJ 433, HC (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
Caparo Industries Plc v Dickman And Others [1990] 2 AC 605, HL (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)
Diman bin Hassan v Pentadbir Tanah & Daerah Hulu Langat [2015] MLJU 887, HC (refd)
Donoghue v Stevenson [1932] AC 562, HL (refd)
Double Advantage Sdn Bhd v Paduan Hebat Sdn Bhd & Anor [2017] MLJU 1427; [2017] 1 LNS 1391, CA (refd)
Lim Fong Tsin & Ors v The Assistant Collector of Land & Ors [1997] MLJU 484; [1997] 1 LNS 7, HC (refd)
Ng Siew Lan v John Lee Tsun Vui & Anor [2017] 2 MLJ 167, FC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (folld)
Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd [2006] 6 MLJ 24; [2006] 8 CLJ 657, HC (refd)
Wong Swee Chin v Public Prosecutor [1981] 1 MLJ 212, FC (refd)
Yap Lai Yoke v Chin Fook Wah & Connected Case [1984] 2 MLJ 274, FC (refd)

Legislation referred to

Federal Constitution art 13
Land Acquisition Ordinance (Cap 69) ss 3, 4, 5
Land Ordinance (Cap 68) s 9

Trevor Maringking (Maringking & Co) for the plaintiff.
Khoo Taan Ti (Khoo Taan Ti & Co) for the defendant.

Celestina Stuel Galid JC:

INTRODUCTION

The parties

[1] The plaintiff is the administrator of the estate of his late father, Yunof @ Edward Meringking ('the deceased') who was the registered owner of the lands held on Native Title No(s) 043175515 and 043175524, both situated at Kampung Pais, in the District of Tuaran, Sabah ('the plaintiff's lands').

[2] The defendant is the registered owner of the land held under Country Lease No 045332625 registered in 2001 pursuant to LA90041033 situated adjacent to the lands ('the defendant's land').

A **[3]** The defendant operates a hotel resort and golf course known as 'Shangri-La's Rasa Ria Resort & Spa' ('the hotel') at the defendant's land.

The plaintiff's claim

B **[4]** The dispute in this case pertains to a concrete road ('the said road'), which the plaintiff alleged the defendant to have constructed without the consent of the deceased and which encroached into the plaintiff's lands.

C **[5]** The plaintiff claimed for the following reliefs in this action:

(a) a declaration that the construction and/or existence of the said road on the plaintiff's lands constitutes a trespass and continuing thereon and are ultra vires art 13 of the Federal Constitution;

D (b) a declaration that the defendant acted in breach of its duty of care and/or committed negligence by excavating the plaintiff's lands without the consent of the plaintiff and thereafter by leaving several big boulders on parts of the plaintiff's lands to render the area thereof unsuitable for any crops cultivation;

E (c) a declaration that the defendant's incorporation or inclusion of the severed portion on the top part of the plaintiff's lands and into the defendant's area of layout plan/development plan prepared in 2007 as illegal;

F (d) an order that damages for the portion of the plaintiff's lands actually affected and/or severed by the construction of the said road in the Master Layout Plan/Development Plan 2007 be assessed and/or valued based on the current market price of the plaintiff's lands;

G (e) special damages in the sum of RM8,340;

(f) general damages for trespass and/or negligence to be assessed;

(g) exemplary and/or aggravated damages for the defendant's brazen and wanton act and/or for totally disregarding the plaintiff's constitutional proprietary rights on the plaintiff's lands to be assessed;

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(h) interest on all sum awarded to the plaintiff at the rate of 5%pa;

(i) a permanent injunction to restrain the defendant from trespassing and/or making use of any portion of the plaintiff's lands howsoever and for whatsoever purpose whether by itself or its servants and/or employee or agents;

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(j) further and/or in the alternative, an order that the defendant forthwith purchase that portion of the plaintiff's lands affected by the construction of the said road and thereafter to take all necessary steps to survey the

boundary of the plaintiff's lands so as to exclude that portion affected by and purchased for the construction of the said road; and

(k) costs.

The defendant's defence

[6] It was averred that the defendant did in the year 1994 contemplate building a road to interlink within the areas of the defendant's land. As that road would have passed through a portion of the plaintiff's lands, a meeting was held between the defendant's representatives and the deceased on 27 October 1994 to discuss on the construction of the road. However what was discussed at the meeting did not eventually materialise.

[7] In the year 1998, the defendant engaged a surveyor company, Jurukur Tempatan Sdn Bhd to carry out a survey of the defendant's land. The survey was carried out based on a sketch plan attached to a letter of offer dated 15 January 1997 issued by the Lands and Surveys Department alienating the land held under LA 900410033 (now the defendant's land) to the defendant.

[8] The defendant's surveyor also relied on an approved tourism area plandated 29 November 1997 by the Director of Lands and Surveys Department which showed that the government had 'acquired or intended to acquire' a portion of the plaintiff's lands ('the said portion of the plaintiff's lands') for tourism purposes ('the approved tourism area plan') and a subsequent survey plan was approved by the Director of Lands and Surveys Department dated 31 July 2000 ('the approved survey plan') showing that the said portion of the plaintiff's lands no longer belonged to the plaintiff.

[9] The title deed to the defendant's land was issued on 8 November 2001 and the said road was subsequently constructed in the year 2014. At that material time, the defendant believed that the said road was constructed on the defendant's land in accordance with the title deed CL 045332615 and the approved survey plan.

[10] It was only after this suit was commenced that the defendant found out that the said portion of the plaintiff's land also appeared in the plaintiff's title deeds to the plaintiff's lands and was not in accordance with the approved tourism area plan.

[11] The title deed to the defendant's land was subsequently rectified by the Lands and Surveys Department and the said portion of the plaintiff's lands was excluded from the defendant's title deed.

The issues to be tried

[12] The plaintiff and the defendant have agreed for the following issues to be tried in this action:

(a) whether the defendant's construction of the said road on the said portion (of the plaintiff's lands) tantamount to a trespass;

(b) whether the defendant was negligent and/or owes a duty of care to the plaintiff in the construction of the said road? If so, whether there is a breach of such duty of care;

(c) whether the defendant is liable for special damages in the sum of RM8,340;

(d) whether the defendant is liable for general/exemplary and/or aggravated damages; and

(e) whether the plaintiff is estopped from taking legal action herein against the defendant.

This court's decision

Issue 5 — Whether the plaintiff is estopped from taking legal action herein against the defendant

[13] As this issue calls for a determination of the plaintiff's right to commence this action, I shall first deal with this issue.

[14] To support its contention that the plaintiff was estopped from commencing this action, the defendant relied solely on the letter dated 8 November 1994 from the defendant to the deceased wherein it was recorded as follows:

> Dear Sir,
>
> *RE: ROAD RESERVE THROUGH YOUR LAND NTS. 04375515 AND 04375524*
>
> We thank you for meeting Mr K P Lu, Steven Goh and the undersigned at your office on 27th October 1994 regarding the above.
>
> We are pleased to note that you are willing to sell the affected land as indicated in the attached plan to us. We shall negotiate on the price after a valuation/recommendation have been obtained from WTW, which shall form the basis for the negotiation and after we have obtained clarifications from the Department of Lands and Surveys on its status.
>
> We are also pleased that you have given us verbal approval for us construct the access road as per the same plan attached. For information, this access road, on completion, will be a public road and handed over to the State Government.

Please signify your consent to the above by signing and returning the duplicate of this letter to us for our further action.

[15] According to the defendant, the deceased had agreed and consented to what was stated in the letter by signing on the said letter. Thus, the plaintiff was estopped from commencing this action. In support, the defendant cited the case of *Double Advantage Sdn Bhd v Paduan Hebat Sdn Bhd & Anor* [2017] MLJU 1427; [2017] 1 LNS 1391 wherein the Court of Appeal had reinstated the principle on the doctrine of estoppel.

[16] With respect, I find the defendant's assertion to be a non-starter and without any merit at all. For one, the defendant does not dispute the fact that the access road referred to in the said letter and as shown in its attachment differed from the said road, which was eventually constructed. Thus, even if it can be construed from the said letter that the deceased had given his consent for the construction of an access road, it is quite a quantum leap to say that by such consent, the deceased had made the defendant believe or expect that it was entitled to construct the said road or any road for that matter some 20 years later in 2014 for estoppel to apply.

[17] In addition, the defendant's insistence that the plaintiff was bound by the consent pursuant to the said letter cannot be reconciled with the contradictory stand of the defendant that the defendant on its part had yet to accept the offer to sell by the deceased pending a valuation of the affected land and some clarifications with the Lands and Surveys Department. To my mind, if the said letter did not bind the defendant, it does not lie in the mouth of the defendant to (at the same time) insist that the plaintiff was (bound) — the defendant cannot have its cake and eat it too.

[18] It was also submitted for the defendant that the deceased and the plaintiff allegedly benefitted from a significant increase in the value of the plaintiff's lands as the said road offered a proper road access and that the construction was fully funded by the defendant.

[19] However, no authority was cited for such proposition i.e. that a plaintiff suing for trespass is estopped on account that he benefitted from such trespass. In any event, in my view, if at all, this issue is only relevant to be considered as a mitigating factor in the assessment of damages in the event this court finds liability in favour of the plaintiff.

[20] Given all of the above, I answer issue 5 in the negative.

Issue 1 — Whether the defendant's construction of the said road on the said portion (of the plaintiff's lands) tantamount to a trespass

[21] *Halsbury's Laws of England* (4th Ed) Vol 45 at p 6312 defines 'trespass' as:

> Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no actual damage is done. A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or, it seems, if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water from another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

[22] In the case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* [2006] 6 MLJ 24; [2006] 8 CLJ 657, Abdul Malik J said:

> The tort of trespass to land or what is known as *trespass quare clausum fregit* consists of three significant factors. Firstly, it is the act of entering upon land in the possession of another — here it would be the plaintiff as against the defendant who is the trespasser. Secondly, having entered upon such land the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land.

[23] It was submitted by the plaintiff that the said portion of the plaintiff's lands has never been acquired by the government so that it could be then given or included as part of the defendant's lands.

[24] The defendant who did not call any of its representatives to testify only called DW1 and DW2 as witnesses. DW1 was the surveyor engaged by the defendant to conduct a survey to establish the boundary of the defendant's land before the issuance of its title deed while DW2 was the consultant engineer in the construction of the said road.

[25] In his witness statement, DW1, testified that the said portion of the plaintiff's lands had been acquired:

> Q3: What did you discover in the midst of carrying out your surveying tasks?
>
> A3: I found out that the sketch plan had been drawn in such a way as to cut off a portion ('the Said Portion') of the plaintiff's land namely NT043175515 and NT043175524.
>
> *I discovered that the Government had acquired the Said Portion* by way of a Locality Diagram (Standard Sheet 79-E-1 and 79-E-5) and Cadastral Sheet (04124552-1202 and 04124552-0301) surveyed and prepared by the Lands and Surveys Department titled 'Penyukatan Kawasan Pelancungan di Kg. Dalit Daerah

Tuaran' (i.e. Measurement of Tourism Area at Kamoung Dalit in the District of Tuaran) certified by District Surveyor in 16.4.1980 and duly approved by the Director of Lands and Surveys Department on 29 November 1997 ('the approved tourism area plan') with a title number 04200109 ... (Emphasis added.)

[26] However, when cross-examine, DW1 said that he did not know of any acquisition notices being issued:

Q: Based on Q&A3 of your witness statement, you claim that the Government had acquired portion of the Plaintff's land. Agree?

A: Yes.

Q: As an experience land surveyor, a land can only be acquired by the Government upon issuance of section 3 notice of the Land Acquisition Ordinance. Agree?

A: Include Section 3, 4 and 5 of Land Acquisition Ordinance. Yes, the Government can acquire.

PUT: There is no evidence that notices under sections 3, 4 and 5 have been issued by the Government for the acquisition of the portion fo the plaintiff's land. Agree?

A: That I don't know.

(see lines 15–30 at p 43 of the notes of proceeding ('NOP')).

[27] The fact of the matter is that there was no evidence adduced by the defendant that such acquisition had ever taken place.

[28] More importantly, after this suit was commenced, the defendant had enquired with the Lands and Surveys Department regarding the said portion of the plaintiff's lands and arising thereof, the Lands and Surveys Department issued an order for rectification of the title deed to the defendant's land on 24 August 2017 on the ground of a 'mistake'.

[29] This is what the Assistant Collector of Land Revenue, inter alia, ordered:

BAHAWA, saya mendapati pelan ukur dan keluasan hakmilik 045332625 ('hakmilik tersebut') adalah silap. Saya telah membuat penyiasatan rapi di bawah seksyen 117 Ordinan Tanah (Sabaj, Bab 68) seperti yang direkodkan dalam Siasatan Tanah (Pemungut) No 63 Tahun 2017 dan berpendapat bahawa pelan ukur, diagram dan keluasan hakmilik tersebut harus diperbetulkan.

[30] Nothingwithstanding the order for rectification, it was contended for the defendant that it could not have been a trespasser as at the time of construction of the said road, the said portion was part of the defendant's land. The title deed to the defendant's land was issued on 8 November 2001 ie which was before the construction of the said road in the year 2014.

[31] In support, the learned counsel for the defendant only cited the High Court case of *Lim Fong Tsin & Ors v The Assistant Collector of Land & Ors* [1997] MLJU 484; [1997] 1 LNS 7, wherein Richard Malanjum J (now CJ of Malaysia), inter alia, held that under s 9 of the Sabah Land Ordinance only the Director is empowered to approve land applications subject to the general or special direction of the Minister. It was further submitted that the fact that title deeds have been issued, indicated no less than that the director has exercised his discretion.

[32] The plaintiff on the other hand referred to the case of *Diman bin Hassan v Pentadbir Tanah & Daerah Hulu Langat* [2015] MLJU 887, for the proposition that when there is a clash of two titles that affects the overlapping land, the first title in time must prevail. So too, in the present case, the plaintiff submitted as the plaintiff's titles were registered on 20 April 1971 whereas the defendant's land was only registered on 8 November 2001.

[33] The plaintiff also cited the case of *Yap Lai Yoke v Chin Fook Wah & Connected Case* [1984] 2 MLJ 274 where the Federal Court when dealing with an issue of whether there has been any encroachment or not, said that:

> Once the plaintiff has established his ttile and encroachment by the defendants the latter must show that they have better titles than the plaintiff in respect of the areas they were alleged to have encroached ... Adverse posession by a person for however long a period does not extinguish the title of the registered proprietor not does it in any way further his right to possesion.

[34] While the learned counsel for the defendant was correct to rely on the case of *Lim Fong Tsin & Ors v The Assistant Collector of Land & Ors* to say that the Director of Lands and Surveys Department did exercise his discretion to alienate the defendant's land, the director's discretion was not infallible. This is implicit in that the court therein, while recognising that the Director of Lands and Surveys Department has the discretion to alienate land under s 9 of the Land Ordinance, went on to further note that an aggrieved party is entitled to challenge the exercise of the director's decision if the discretion was wrongly exercised.

[35] In the present case, the order for rectification was made on 24 August 2017 ie after the commencement of the action but before the close of the pleadings. As such, the plaintiff was no more aggrieved by the decision of the Director of Lands and Surveys Department but the defendant which was being sued for trespass and negligence, was. To my mind, it was the defendant who was entitled to (but did not) bring in a third party action against the Lands and Surveys Department for the 'wrongful' issuance of the title deed which included the said portion of the plaintiff's lands.

[36] In addition, the fact that the Lands and Surveys Department did rectify the defendant's title deed to exclude the portion of the plaintiff's lands (whereon the said road was constructed) conclusively established that the plaintiff had never been displaced of that portion of the plaintiff's lands. The purported alienation and subsequent issuance of the title deed by the Director of the Lands and Surveys Department to the defendant was in fact wrong in law and could not have given any right to the defendant in the first place.

[37] So where does it leave the defendant in the plaintiff's claim for trespass?

[38] The *Oxford Dictionary of Law* (New Ed) describes trespass to land as follows:

> Trespass to land usually takes the form of entering it without permission. *It is no defence to show that the trespass was innocent (e.g. that the trespasser honestly believed that the land belonged to him). Trespass to land or goods is a wrong to possession rather than to ownership*. Thus a tenant of rented property, for example, has the right to sue for trespass to that property. Trespass to land is a tort but not normally a crime. (Emphasis added.)

[39] In the case of *Terra Damansara Sdn Bhd v Nandex Development Sdn Bhd* the plaintiff and the defendant were neigbouring landowners. The defendant relied on the information given by its project consultants that the plaintiff's lot was unoccupied and unalienated and caused to be inserted ground anchors into the plaintiff's land without the plaintiff's consent. In finding that the defendant's act constituted trespass, Abdul Malik J said:

> It is not the law that a man cannot be a trespasser unless he knows he is one (*Conway v George Wimpey & Co Ltd* [1951] 2 KB 266 at p 273). *If the entry is intentional, it is actionable even though that entry was made under a mistake or the defendant honestly believed that the land was his own* or, like the present case, the land was unoccupied and unalienated or that the defendant believed that he had aright of entry on the land. In *Morris v Beardmore* [1981] AC 446, the House of Lords reasserted the fundamental right of privacy of the home. (Emphasis added.)

[40] Similarly, Edgar Joseph Jr SCJ (as he then was) in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 found the defendants liable for trespass despite the defendant's defence that they had the consent of the plaintiff's sister-in-law to carry out the demolition works. His Lordship said:

> Trespass is normally associated with intentional acts even though committed by mistake; for mistake is no defence. (See *Basely v Clarkson*.) It follows, therefore, that the story of D1 and D3 that they carried out the demolition works concerned in the honest belief that they were entitled to do so (even if true, and this I cannot accept) is no defence. *Their mistaken view of the law, in particular the effect of the decision of Mustapha J in dissolving the injunction and the decision of the Supreme Court in Poh*

> *Siew Siang's case as to the availability of self-help, is therefore no defence to an action for trespass.* It is, also in my view, no answer to the claims for exemplary damages having regard to the particular circumstances of this case. (Emphasis added.)

[41] I am of the view that as the plaintiff was never in law dispossessed of the said portion of the plaintiff's lands, the construction of the said road by the defendant amounted to trespass. The only issue is whether the defendant could be absolved from liability due to the 'mistake' by the Lands and Surveys Department in issuing the title deed, which included the said portion of the plaintiff's lands. Based on the authorities, such 'mistake' is not a valid defence to the defendant. I therefore answer issue 1 in the affirmative.

Issue 2 — Whether the defendant was negligent and/or owes a duty of care to the plaintiff in the construction of the said road? If so, whether there is a breach of such duty of care

[42] It is settled law that one owes a duty of care to one's neighbour. Lord Atkin in the oft-quoted case of *Donoghue v Stevenson* [1932] AC 562 stated the law as follows:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have been in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question.

[43] In the case of *Caparo Industries Plc v Dickman And Others* [1990] 2 AC 605, the court formulated the following three questions to be asked in determining whether a duty of care exists:

(a) whether the damage is reasonably foreseeable;

(b) whether there is a relationship of proximity between the plaintiff and the defendant; and

(c) whether it is just, fair and reasonable to impose a duty in such a situation.

[44] Reverting to the facts of the present case, it is not in dispute that the plaintiff's lands and the defendant's land were adjacent to one another. As such it can hardly be denied that the plaintiff and the defendant had a relationship of proximity as envisaged in *Donoghue v Stevenson.*

[45] In para 24 of the SOC, the plaintiff has particularised the offending acts of the defendant as follows: A

(a) the defendant did nothing to check on the boundary between the defendant's land and the plaintiff's lands before it commenced work for the construction of the said road on the said lands; B

(b) the defendant failed to ascertain the boundary of the defendant's land and the plaintiff's lands before the excavation work were undertaken on the said lands for the construction of the said road;

(c) the defendant excavated and severed the plaintiff's lands into two portions and removed earth thereof without getting the consent of the plaintiff; C

(d) the defendant rolled down and/or left several big boulders on the lower part of plaintiff's lands when constructing the said road thus rendering part of the plaintiff's lands unsuitable for any crops cultivation thereon and thus caused damage to the plaintiff's lands; and D

(e) in all circumstances of the case, failing to properly investigate diligently the boundary of the defendant's lands before proceeding to commence construction work of the said road on the plaintiff's lands. E

[46] It has already been discussed above that the defendant had constructed the said road thinking that it was entitled to do so as the said portion of the plaintiff's lands had been included in the title deed to the defendant's land. But was damage foreseeable in the circumstances of the case? F

[47] Based on the facts and circumstances of this case, I would answer the question in the affirmative.

G

[48] The evidence showed that the defendant's own professional surveyor had prior to the issuance of the defendant's title deed in 2001, submitted in a letter to the district engineer dated 15 May 1998, a survey report which stated as follows:

> The survey is carried out as per accepted offer reference LS 401.1.501/379 dated 15 January 1997. *Please note that part of the area of NT 043175515 and NT 043175524 which appeared to have been acquired for 'Tourism' as per approved plan 04124552 is included in this lot (see attached sketch for detail). You may wish to get further confirmation from the Director of Lands & Surveys or Penolong Pemungut Hasil Tanah, Tuaran on this matter*. (Emphasis added.) H I

[49] When cross-examined on his survey report, DW1 said this:

> Q: In your Q&A6, you mentioned about seeking confirmation of the alleged acquisition of portion of the plaintiff's lands. *This shows that there was uncertainty on*

the defendant's part whether the portion of the plaintiff's lands have been acquired or not. Agree?

A: *Yes*. (Emphasis added.)

[50] Despite DW1's concern, there was no evidence that DW1 and/or the defendant had done anything more to ascertain this matter. As none of the defendant's representatives came to testify, this question could also not be asked of them.

[51] In addition and despite the fact that the title deed to the defendant's land was issued in 2001, DW2 who was the consultant engineer engaged by the defendant for the construction of the said road, sent a letter dated 23 October 2012 to the district engineer, inter alia, stating Dewan Bandaraya Kota Kinabalu's (DBKK) comments that 'the land acquisition for the road should be settled first'.

[52] Again, there was no evidence that the issue of acquisition raised by DBKK was attended to by the defendant at all before proceeding to construct the said road. The defendant never attempted to check whether the said portion of the plaintiff's lands was in fact acquired by the state government.

[53] It will be noted from DW1's earlier testimony in cross-examination that it was only a matter of checking if there had been a notice issued under ss 3, 4 or 5 of the Land Acquisition Ordinance. This court takes judicial notice that if indeed issued, such notice would have been readily available, as it would have been published in the *gazette* in accordance with the said provisions. However, there is no evidence that the defendant and/or its consultants did that.

[54] While on this issue, it was contended that the defendant was entitled to rely on the official documents with the Lands and Surveys Department such as the approved tourism area planand the approved survey plans and as such should not be held liable for negligence.

[55] However, I agree with the submissions by the plaintiff that as a prudent surveyor, DW1 had the duty to ascertain whether there was acquisition of the affected lands. Given the fact that the defendant and the deceased had prior discussions about an access road which would affect the plaintiff's lands, it was inconceivable that the defendant would merely rely on the purported 'official documents' when DW1 himself agreed that a notice of acquisition was required.

[56] As by the rectification of the defendant's title deed in 2017, it cannot be disputed that the said road had been constructed on the said portion of the

plaintiff's land, there is no issue of whether there was a breach of the duty of care by the defendant to the plaintiff. I therefore answer issue 2 in the affirmative.

Issue 3 — Whether the defendant is liable for special damages in the sum of RM8,340

[57] The plaintiff's claim for special damages is particularised in para 25 of the SOC as follows:

> 25. As a result, the defendant's adamant denial despite the construction and alignment of the said Road was exactly shown in the plan attached to the defendant's letter dated 8 November 1994 and the excavation of the said Lands have put the plaintiff to considerable trouble, inconvenience, anxiety and expense and thus he suffered loss and damage.
>
> *Particulars of Special Damages*

(i)	Land Search fees	RM40.00
(ii)	Certified True Copy of the two title deeds	RM100.00
(iii)	Preliminary Survey Report	RM2,000.00
(iv)	Topographical & Demarcation survey plan	RM6,200.00
	TOTAL:	RM8,340.00

[58] In support of the claim for special damages, PW1 tendered evidence in the form of land search certificates and receipts, certified true copies of the plaintiff's title deeds and receipts for the extracts, payment receipts for the on-site preliminary investigation or survey report and the topographical and demarcation survey plan, tax invoice and payment receipt thereof.

[59] Save for cross-examining PW1 on the allegation that the defendant's then solicitors had asked the deceased to arrange for his own survey and at his own expense, the learned counsel for the defendant did not cross-examine PW1 on the other items claimed as special damages and are therefore taken to have been admitted — see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, *Ng Siew Lan v John Lee Tsun Vui & Anor* [2017] 2 MLJ 167 and *Browne v Dunn* (1893) 6 R 67. In addition, the defendant did not bring in any evidence to rebut the amount claimed under this head by the plaintiff.

[60] As for the plaintiff's allegation that it was the defendant who had asked the plaintiff to arrange for his own survey of the lands at his own expenses based on the letter from the defendant's then solicitors to the plaintiff's solicitors dated 14 April 2016, I find that there is nothing in the said letter to suggest so. The letter merely stated that the plaintiff was 'at liberty' to arrange for his own survey report and valuation at his own costs and expense. However, given the

A circumstances of the case, I am of the view that the plaintiff was justified in incurring such expenses in view of the dispute and as such was claimable in this action.

B **[61]** I therefore answer issue 3 in the affirmative and allow the plaintiff's claim for special damages in the sum of RM8,340.

Issue 4 — Whether the defendant is liable for general/exemplary and/or aggravated damages

C **[62]** In dealing with this issue, I am guided by what the Court of Appeal in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500 said as follows:

> [32] Now, aggravated damages are classified as a species of compensatory damages,
D which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.
>
> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of
E the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and
F retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 347; *A B v Southwest Water Services* [1993] All ER 609 *Broome v Cassell & Co* [1971] 2 QB 354, *Laksamana Realty Sdn Bhd v Goh Eng Hwa and Another Appeal* [2006] 1 MLJ 675).

G **[63]** For the defendant, the case of *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor* [2001] 6 MLJ 497; [2001] 4 CLJ 433 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* were cited to contend that the defendant did not do anything that was malicious or illegal and thus, should not be liable for aggravated and/or exemplary damages.
H It was reiterated that at the material time of construction the said road, the said portion of the plaintiff's lands were included in the defendant's title deed.

[64] I tend to agree.

I **[65]** The plaintiff pleaded the following facts in support of the claim for exemplary and aggravated damages:

(a) that the defendant did not apply and/or obtain a right of way in compliance with the relevant provisions under the Land Ordinance before constructing the said road over the said lands ('the plaintiff's lands');

(b) that the defendant excavated and severed the plaintiff's lands into two portions and removed earth thereof without paying and getting the consent of the plaintiff;

(c) that the defendant rolled down and/or left several big boulders on the lower part of the said lands when constructing the said road thus rendering part of the said lands unsuitable for any crops cultivation thereon;

(d) that the defendant maliciously and adamantly denied that the said road's alignment was in fact in accordance with the plan attached to its letter reference PD/P/GP/2–04/94 dated 8 November 1994; and

(e) that the defendant incorporated the severed portion on the southern tip of the said lands into the defendant's own area which it wanted to be developed under the said Master Layout Plan/Development Plan 2007 for it to make profit thereof.

[66] During the trial, PW1 merely repeated the above averments. There was no evidence led which contradicted the defendant's assertion that it had relied on its (albeit erroneously issued) title deed when it constructed the said road. To say it another way, the evidence led did not show that the defendant's action was with malice or vindictiveness.

[67] That being the case, I find that there is no justification for an award of aggravated and/or exemplary damages. I therefore answer issue 4 in the negative.

CONCLUSION

[68] Conclusively, I find that the plaintiff has proven his case on a balance of probability that the defendant had, by constructing the said road, committed trespass on the said portion of the plaintiff's lands.

[69] I also find that the defendant owed a duty of care towards the plaintiff and that duty of care was breached when it failed to ascertain whether the said portion of the plaintiff's lands had been properly or lawfully acquired before proceeding to construct the said road in 2014 despite the historical negotiations with the deceased since 1994 and the concerns raised by its surveyor in 1998 and the comments by DBKK in 2012.

[70] I therefore grant an order in terms of prayers 1, 2, 5, 6, 8, 10 as amended and costs subject to payment of allocatur. The amended prayer 10 shall read as follows:

> An order that the defendant forthwith purchase the portion of the said lands affected by the construction of the said road and with liberty for parties to apply to Court for determination of the purchase price in the event parties are unable to agree and thereafter to take all the necessary steps to survey the boundaries of the affected portion of the said lands so as to exclude that portion affected by and purchase for the construction of the said road.

Claim allowed in part.

Reported by Izzat Fauzan